Office of the Clerk, Supreme Court, U.S.
FILED
OCT 17 1983
ALEXANDER L. STEVAS, CLERK

No. 83-430

IN THE

Supreme Court of the United States

October Term, 1983

LOUIS HEIMBACH, individually and as County Executive of Orange County, on behalf of all persons in Orange County liable for the payment of certain sale and use taxes under the provisions of Article 28 of the Tax Law of the State of New York; and PETER F. COHALAN, individually and as County Executive of Suffolk County, on behalf of all persons in Suffolk County liable for the payment of certain sale and use taxes under the provisions of Article 28 of the Tax Law of the State of New York,

Appellants,

against

THE STATE OF NEW YORK and JAMES H. TULLY, JR., as the Commissioner of the New York State Tax Commission,

Appellees,

WARREN M. ANDERSON, as Temporary President and Majority Leader of the New York State Senate,

Intervenor-Appellee.

On Appeal from the Court of Appeals of the State of New York

MOTION TO DISMISS AND/OR AFFIRM

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Appellees
Two World Trade Center
New York, New York 10047
(212) 488-2483

Of Counsel:

GEORGE D. ZUCKERMAN
Deputy Solicitor General

MELVYN R. LEVENTHAL
Deputy First Assistant Attorney General

RICHARD G. LISKOV
Assistant Attorney General

Dated: October 14, 1983

Questions Presented

1. Whether N.Y. Tax Law § 1109, increasing a general sales tax within certain counties for purposes of funding mass transit services violates the Equal Protection Clause solely because some taxpayers in some counties may receive less direct or indirect benefit from the revenue raised thereby than other taxpayers on whom the tax is imposed, where the record is undisputed that the revenue raised will be applied for transportation services in every affected county.

2. Whether N.Y. Tax Law § 1109 violates the Equal Protection Clause on the contention that such counties differ in geographic, economic, and demographic respects, where (1) the record is absolutely barren of any evidence to support such contention and (2) the record is undisputed that all such counties are linked demographically and economically for the purposes of operating an adequate transportation system among such counties so as to afford a rational basis for the statute.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No. 83-430

IN THE

Supreme Court of the United States

October Term, 1983

LOUIS HEIMBACH, individually and as County Executive of Orange County, on behalf of all persons in Orange County liable for the payment of certain sale and use taxes under the provisions of Article 28 of the Tax Law of the State of New York; and PETER F. COHALAN, individually and as County Executive of Suffolk County, on behalf of all persons in Suffolk County liable for the payment of certain sale and use taxes under the provisions of Article 28 of the Tax Law of the State of New York,

Appellants,

against

THE STATE OF NEW YORK and JAMES H. TULLY, JR., as the Commissioner of the New York State Tax Commission,

Appellees,

WARREN M. ANDERSON, as Temporary President and Majority Leader of the New York State Senate,

Intervenor-Appellee.

On Appeal from the Court of Appeals of the State of New York

MOTION TO DISMISS AND/OR AFFIRM

Appellees, State of New York and Hon. Roderick Chu, as Commissioner of Taxation & Finance* in the above entitled cause, move to dismiss and/or affirm on the ground that it is manifest that the questions on which the decision of the cause depend are so unsubstantial as to need no further review by this Court.

* Commissioner Chu succeeded to the office of Commissioner of Taxation and Finance in January, 1983.

Counter-Statement of the Case

This appeal has been noticed by plaintiffs-appellants from a unanimous decision of the New York State Court of Appeals, 59 N.Y.2d 891 (1983), sustaining the constitutionality of New York Tax Law § 1109, L. 1981, Ch. 485. This statute increases, by one-quarter of one per cent, the sales and compensating use tax applicable in the twelve counties of the State of New York which are serviced by the Metropolitan Transportation Authority ("MTA") and which collectively comprise the Metropolitan Commuter Transportation District ("the District"), N.Y. Public Authority Law § 1262. All of the revenue raised by the increase in the sales tax in the District will be applied for transportation services provided by the MTA within the District.

Appellants' arguments were fully addressed and unanimously rejected by the intermediate appellate court, *Heimbach et al.* v. *State et al.*, 89 A.D.2d 138 (1982) and again by the Court of Appeals, 59 N.Y.2d 891 (1983). These contentions are utterly devoid of merit based upon a long line of controlling opinions of this Court stretching back over a century.

ARGUMENT

Appellants Have Not Stated a Valid Cause of Action Under the Equal Protection Clause, and Summary Judgment Dismissing Their Claims Was Fully Warranted.

In their first two causes of action appellants alleged that the amount of sales tax to be collected in Orange and Suffolk Counties under Chapter 485 was so much greater than the value of MTA services and facilities to the taxpayers therein that the tax lacked a reasonable basis and thereby denied them equal protection (Compl. ¶¶ 3, 19, 20, 22, 24, 25, 26, 30, 32, 35, 36; A 10, 14-19).* Their complaint specifically alleges a theory of disproportionate burdens for benefit received in paragraphs 22, 25, 26, and 32 (A 7-9) which they reiterate in their Jurisdictional Statement at 6-11. Second, they argue that the sales tax increase is actually a "special assessment", and one that is void precisely because the burden outweighs the benefit (Jurisdictional Statement at 7-10). Third, they contend that Orange and Suffolk Counties are so dissimilar to other counties in the District as to make their inclusion in the taxing scheme irrational. Appellants' arguments both ignore the unrebutted factual record in this case and proceed in utter disregard of numerous opinions by this Court in which similar claims repeatedly have been rejected.

Submitted with appellees' cross-motion for summary judgment was an affidavit of David Plavin, Executive Director of the MTA, which thoroughly refuted appellants' erroneous implication that MTA services in these two counties are either insignificant or peripheral to the MTA's overall capital and operating programs (A 64-71). The

* "A —" denotes references to the Appendix on Appeal used in the appellate courts below.

Plavin affidavit details the various transportation services which the MTA provides in these counties, *e.g.*, the Port Jervis line in Orange County for which new cars and locomotives have been acquired (¶ 9) (A 68), Stewart Airport, in which MTA has invested over $30 million in capital improvements (¶ 10) (A 68), as well as upgrading the Long Island Railroad in Suffolk County. Moreover, Mr. Plavin provided sound reasons why Orange and Suffolk Counties were originally included, and continue to be, in the District based on demographic, geographic and economic factors (¶¶ 5-8, A 66-79).

At no time did appellants offer factual evidence whatsoever to rebut these assertions, and there is clearly a sufficient nexus between the tax and the transportation services provided in Orange and Suffolk Counties which the tax will help subsidize.* Thus, as a matter of law, it is neither

* In misleading fashion, appellants have appended to their Jurisdictional Statement an MTA report on cost/benefit ratios among the various counties which they never sought to include in the record below. The MTA Report calculates a cost/benefit ratio based on numerous revenue sources of which Tax Law § 1109 is only one. It is completely erroneous for appellants to cite the cost/benefit ratio for Orange County as if this ratio was based solely on revenue raised and spent under § 1109.

The appellants, moreover, ignore the fact that other counties within the District provide direct subsidy to MTA services or impose other taxes which do not apply in Orange County, *e.g.*, real estate tax. Appellants also ignore the fact that, according to the Report, Suffolk County, whose County Executive, Peter Cohalan, is a co-appellant, achieves one of the most favorable cost/benefit ratios of the twelve Counties in the District. Report, Table IV, reprinted at Jurisdictional Statement, 44a.

Even if appellants' facts were more accurately stated this would not control the constitutional issue given the Court's longstanding rejection of cost/benefit claims in adjudicating the validity of general taxes under the Equal Protection Clause. While the Report may offer policy arguments for Orange County to be excluded from the District, these arguments are, of course, appropriate for the State Legislature, not for this Court.

irrational nor invidious to include these counties within the statute's scope. Not only will MTA services in these two counties be funded partially from the tax, but the two counties have long been part of the Commuter Transportation District and two MTA Directors are selected with the participation of the County Executives of the two counties. Public Authorities Law, §§ 1262, 1263(a). In addition, as part of the same comprehensive legislation that included the subject tax increase, the Legislature specifically broadened the opportunity for residents of these two counties to participate in formulating MTA policies. Public Authorities Law, §§ 1266-d, 1266-e.

It was incumbent upon appellants to rebut specifically the detailed factual proof contained in the Plavin Affidavit and Exhibit (A 64-121), which appellees submitted to obtain summary judgment. Instead, they relied solely on conclusory allegations to sustain their equal protection claims.

In this challenge to a tax classification on equal protection grounds, appellants must demonstrate that no rational basis can be conceived to justify the classification. *Allied Stores* v. *Bowers,* 358 U.S. 522, 528 (1959). Indeed, this Court has recently reiterated that legislative classifications in taxation challenged on equal protection grounds are unassailable so long as their rationality is even "debatable". *Western & Southern Life Insurance Co.* v. *Bd. of Equalization,* 451 U.S. 658 (1981), *citing U.S.* v. *Carolene Products,* 304 U.S. 144, 154 (1938). The evidence on this record indicates that the reasonableness of this legislation is more than merely arguable; its reasonableness is readily apparent, given the importance of adequate funding for critical mass transit needs, the undisputed fact that some portion of the

revenue raised by the tax will be spent for transportation services in the two counties, and the unrebutted evidence demonstrating the interrelationship of these counties to the other counties of the District.

Appellants are hardly the first taxpayers to advance their theory of disproportionate tax burdens. In virtually every case for nearly a century, this Court has dismissed nearly identical arguments. *See, e.g., Carmichael* v. *Southern Coal & Coke Co.*, 301 U.S. 495, 521-22 (1937); *Memphis & Charleston Ry. Co.* v. *Pace*, 282 U.S. 241 (1931); *Missouri Pacific Ry. Co.* v. *Rd. Improvement Dist.*, 266 U.S. 187 (1924); *St. Louis & S.W. Ry. Co.* v. *Nattin*, 277 U.S. 157 (1927); *Dane* v. *Jackson*, 256 U.S. 589 (1921); *Southern Pac. Co.* v. *Kentucky*, 222 U.S. 63 (1911); *Wagoner* v. *Evans*, 170 U.S. 588 (1897). *See also*: *Becker* v. *Levitt*, 489 F.2d 1087 (2d Cir. 1973); *American Commuters Assn.* v. *Levitt*, 279 F. Supp. 47 (S.D.N.Y. 1967), *aff'd*, 405 F.2d 1148 (2d Cir. 1968) (commuter tax upheld against argument by nonresidents of denial of equal protection as to benefits received).

In *Carmichael* v. *Southern Coal & Coke Co., supra*, this Court decisively laid to rest exactly the same kind of claim which these appellants tender. There a taxpayer sued to invalidate the unemployment compensation payroll tax on the ground, *inter alia*, that it did not benefit from the expenditures funded from the tax proceeds. Rejecting the equal protection argument, Justice Stone stated:

> It is not a valid objection to the present tax, conforming in other respects to the Fourteenth Amendment, and devoted to a public purpose, that the benefits paid and the persons to whom they are paid are unre-

lated to the persons taxed and the amount of the tax which they pay—in short, that those who pay the tax may not have contributed to the unemployment and may not be benefited by the expenditure.

* * *

A tax is not an assessment of benefits. It is, as we have said, a means of distributing the burden of the cost of government. The only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes. See *Cincinnati Soap Co.* v. *United States, supra.* Any other view would preclude the levying of taxes except as they are used to compensate for the burden on those who pay them, and would involve the abandonment of the most fundamental principle of government—that it exists primarily to provide for the common good. A corporation cannot object to the use of the taxes which it pays for the maintenance of schools because it has no children. *Thomas* v. *Gay,* 169 U.S. 264, 280. *This Court has repudiated the suggestion, whenever made, that the Constitution requires the benefits derived from the expenditure of public moneys to be apportioned to the burdens of the taxpayer, or that he can resist the payment of the tax because it is not expended for purposes which are peculiarly beneficial to him. Cincinnati Soap Co.* v. *United States, supra; Carley* v. *Hamilton & Snook, supra,* 72; *Nashville, C. & St. L. Ry. Co.* v. *Wallace,* 288 U.S. 249, 268; see *Union Refrigerator Transit Co.* v. *Kentucky,* 199 U.S. 194, 203. (301 U.S. at 521, 523; (emphasis added).

Appellants make the startling claim that § 1109 creates a "special assessment" which illegally burdens them in disproportionate fashion. Appellants do not cite a single deci-

sion whereby a general sales tax applied to an infinite multitude of variegated transactions by millions of persons every day has ever been judicially treated as a "special assessment" simply because the sales tax is imposed on a particular geographic area. Under appellants' reasoning, every sales tax or excise tax imposed in a locality would constitute a "special assessment", thereby stripping the latter term of any meaning.

In both *Illinois Central R.R. Co.* v. *Decatur*, 147 U.S. 190 (1892) and *Village of Norwood* v. *Baker*, 172 U.S. 269 (1898), relied on by appellants, the Court drew a very clear distinction between general taxes, in return for which no peculiar benefit need be given to taxpayers, and "special assessments", which "proceed upon the theory that when a local improvement enhances the value of neighboring property that property should pay for its improvement." *Illinois R.R. Co., supra*, at 198.

Unlike a special assessment for streets, water supplies or sewers, there is not the slightest evidence that the one-quarter per cent increase in the sales tax applies the theory that the particular property in the District subject to the tax would gain in value from transportation services funded thereby as opposed to a general societal benefit in efficient transportation. Clearly, the Legislature was not acting upon appellants' absurd notion that a household appliance or a pack of chewing gum, sold subject to the sales tax, would be more valuable because the Long Island Rail Road obtained new coaches or the New York City subways new signal lights. Rather, these transit improvements are a service of State government intended to benefit residents,

businesses, and visitors within the District generally, without regard to the value of any particular real estate or personalty. Indeed, the challenged tax is not even applied to sales of real property. See N.Y. Tax Law § 1105.

Appellants also argue that because Orange and Suffolk Counties are economically, demographically and geographically different from the remainder of the District, § 1109 should not apply to them to the same extent as the other ten counties. This cavil has no more validity than their other contentions. Appellants have made no factual showing as to all of these asserted differences.

Even if they had done so, however, any economic or demographic differences are not material under the governing equal protection clause standard. It is undisputed that there are MTA services and facilities in those counties, utilized by residents of those counties, that are either directly or indirectly subsidized with the revenue raised by the sales tax increase. It is also undisputed that there are significant economic and social links between these two counties and the rest of the metropolitan area in which the MTA operates (A 66-68) such that transportation improvements throughout the metropolitan area benefit commuters, businesses and consumers in these two counties. It is undisputed that residents of these two counties have an opportunity to participate in MTA's policy deliberations, Public Authorities Law §§ 1263(1)(a), 1266-d, 1266-e, and appellants have never challenged the inclusion of the two counties in the District since 1968 under Public Authorities Law § 1262.

Whatever may be the result if residents of a county located hundreds of miles from the nearest MTA facility were specially taxed to provide revenues exclusively earmarked for the Long Island Railroad or for commuter lines in Orange County, it is surely reasonable to include Orange County and Suffolk County in the taxing scheme to help improve transit facilities which either directly or indirectly benefit residents, visitors and businesses therein and which are essential to a healthy regional economy. Appellants have failed utterly to demonstrate any palpable arbitrariness in the statute so as to establish its invalidity. *Regan* v. *Taxation with Representation of Washington*, —— U.S. ——, 76 L.Ed. 2d 129, 138 (1983), *citing Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 (1973) and *Madden* v. *Kentucky*, 309 U.S. 83, 87-88 (1940). *See also, Salzburg* v. *Maryland*, 346 U.S. 545 (1954); *McGowan* v. *Maryland*, 366 U.S. 420, 425 (1961) (geographic classifications upheld if rationally related to legitimate state interest).

Appellants have failed to advance any proof that ¶ 1109 lacked a conceivable basis in reason so as to overcome the presumption of constitutionality that the statute enjoys. *City of New Orleans* v. *Dukes*, 427 U.S. 297, 303 (1976). As a matter of law, therefore, the mere absence of an exact equivalence between revenue raised and revenue expended cannot invalidate a general tax that unquestionably bears a rational relationship to a legitimate, indeed a vital, state interest in insuring adequate transit service throughout the New York metropolitan area.

Conclusion

Having failed to present any facts or applicable law to raise even a semblance of a substantial constitutional issue, appellees respectfully contend that the instant appeal be dismissed or affirmed.

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Appellees

Of Counsel:

GEORGE D. ZUCKERMAN
Deputy Solicitor General

MELVYN R. LEVENTHAL
Deputy First Assistant Attorney General

RICHARD G. LISKOV
Assistant Attorney General

Dated: October 14, 1983